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2023 Title IX Training Academy – Module 1

Compliance Training for the Title IX Team:  
The Title IX Team & Process for  
School Districts & County Offices

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September 18, 2023

Presented by:

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## TITLE IX SCOPE AND DEFINITIONS

### Federal Law - Title IX:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

(Title IX of the Education Amendments of 1972 (20 U.S.C. Section 1681 et seq.) and related regulations (34 C.F.R. Part 106).)

## Response to Sexual Harassment

According to **34 CFR §106.44(a)**: A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States **must respond promptly in a manner that is not deliberately indifferent** (e.g., clearly unreasonable in light of the known circumstances).

## Actual Knowledge

- Actual knowledge for **K-12 Educational Institutions** occurs when **any employee** has notice of sexual harassment or allegations of sexual harassment.
- Best practice to provide annual training to K-12 employees about reporting responsibilities to the Title IX Coordinator or other designated Title IX Team Member.

## Sexual Harassment Defined, Cont.

Conduct on the ***basis of sex*** under one of following:

### 3. Other Sexual Acts

- **Sexual assault** per 20 U.S.C. 1092(f)(6)(A)(v): Includes Forcible and Nonforcible Sex Offenses
- **Dating violence** per 34 U.S.C. 12291(a)(10)
- **Domestic violence** per 34 U.S.C. 12291(a)(8)
- **Stalking** per 34 U.S.C. 12291(a)(30)

## Other Sexual Acts as Sexual Harassment under Title IX

### 1. Sexual Assault

- **Forcible:**
  - Any sexual act directed against Complainant, forcibly, against Complainant's will, or without consent, including rape, sodomy, sexual assault with an object, and fondling
- **Nonforcible:**
  - Offenses that do not involve force where the Complainant is incapable of giving consent, including statutory rape and incest

## Other Sexual Acts

### 4. Stalking (34 U.S.C. 12291(a)(30))

The term “stalking” means engaging in a course of conduct (on the basis of sex) directed at Complainant that would cause a reasonable person to:

- **Fear** for their safety or the safety of others; or
- Suffer substantial **emotional distress**

## ROLES OF THE TITLE IX TEAM

## Title IX Team: Title IX Coordinator

### Title IX Coordinator duties, continued:

- Reviews investigative reports, written decision, & appeal decision, but **does not make decision** about responsibility
- Drafts letter of outcome after written decision issued
- *Likely does not* determine sanctions
- If applicable, ensures effective implementation of remedies for Complainant, sanctions for Respondent, and overall corrective plan
- *May* investigate when needed
- *May* act as facilitator of an informal resolution process

## Title IX Team: Investigator(s)

### Investigator Role:

- Trained and Knowledgeable
- Impartial, unbiased, & free from general or specific conflicts of interest
- Investigates formal complaint
  - Reviews complaint
  - Gathers, reviews, weighs, and synthesizes evidence
  - Interviews parties and witnesses
  - Assesses relevance and credibility
- Coordinates two review processes and assesses responses
- Prepares a written investigative report and compiles evidence
- Investigator does **not** make decision about whether Respondent is “responsible” for violation of sexual harassment policy

## Title IX Team: Informal Resolution Process Facilitator

### Informal Resolution Process Facilitator Role:

- Cannot require the parties to participate in informal process or to waive the right to an investigation
- Process cannot be used where an employee is alleged to have sexually harassed a student
- Obtains voluntary, written consent of the parties to resolve the matter anytime before a determination of responsibility is made
- Process does not involve full investigation or adjudication, but includes a written notice to the parties disclosing the allegations, the requirements of the process, and notice that the parties can withdraw and resume the grievance process
- May consider the use of a trained mediator or trained restorative justice facilitator, if requested and appropriate

## INTAKE PROCESS FOR REPORTS OF SEXUAL HARASSMENT

## Supportive Measures

### 1. Requirement to Offer Supportive Measures per §106.30 & §106.44

- Must be offered to Complainant as soon as District has notice of possible Title IX issue and to Respondent after complaint filed

### 2. Avoid Burden on Parties

- Supportive Measures must be non-punitive, non-disciplinary, and not unreasonably burdensome to the other party

### 3. Individualized

- Supportive Measures must ensure equal educational access, protect safety, and/or deter sexual harassment

### 4. Examples of Supportive Measures

- Counseling, course-related adjustments, modify schedule, extend deadlines, campus escort, increased security and monitoring, and/or mutual restrictions on contact between the parties

## Allow Advisor of Choice

- The Title IX regulations provide the Complainant and Respondent with the same opportunities to have “others present” during any grievance proceeding
  - An advisor may be a parent, family member, attorney, or other person
  - The advisor may be present with the person they are advising for any meeting, interview, or hearing, and for the inspection and review of the evidence obtained as part of the investigation
  - The advisor may assist with a written cross-examination process and *shall* ask the cross-examination questions if recipient opts for a live hearing process
    - If a party does not have an advisor to conduct cross-examination at a live hearing, the institution must provide one to the party
  - The institution may establish restrictions on the extent of an advisor’s participation, if restrictions apply equally to both parties



## TITLE IX GRIEVANCE PROCESS

### Grievance Process

1. Basic Requirements
  2. Notice of Allegations
  3. Dismissal of Formal Complaint
  4. Consolidation
  5. Investigation
  6. Written Questions Between Parties
  7. Determination of Responsibility
  8. Appeals
  9. Informal Resolution
  10. Recordkeeping
- See 34 CFR § 106.45(b)

## Notice of Allegations

- **Provide Notice of Allegations to Each Party, continued**
  - **Additional Items in Notice of Allegations:**
    - Identification of potential policy violations (not just Title IX)
    - Identification of the range of possible disciplinary sanctions and remedies
    - Statement that Respondent is presumed not responsible
    - Notification that a determination of responsibility will be made at the conclusion of the grievance process
    - Notification that each party may have an advisor of choice, who may be an attorney
    - Prohibition against parties knowingly making false statements or knowingly submitting false information

## Notice of Allegations

- **If additional allegations are discovered, provide written Notice of *Additional* Allegations**
- **Provide written notice of any changes in the process, including:**
  - Delays
  - Meetings
  - Interviews
  - Hearings
  - Appeals
  - Decisions
  - Other

## Consolidation of Formal Complaints

- **A recipient may consolidate formal complaints as to allegations of sexual harassment where the allegations arise out of the same facts or circumstances**
  - Against more than one Respondent;
  - By more than one complainant against one or more respondents; or
  - By one party against the other party (cross-claims)

## Investigation

### 1. Presumption

- The institution must presume Respondent is *not responsible* for the alleged conduct

### 2. Evidence Gathering

- Investigator for the educational institution has the burden to gather sufficient evidence; the burden to gather evidence is **not** on the Complainant or Respondent
- Investigator cannot gather privileged information without voluntary, written consent (e.g., physician or psychiatrist records, etc.)

### 3. Written Notice with Time to Prepare

- Provide written notice to the parties for all interviews with sufficient time for the party to prepare to participate

## Investigation, continued

### 7. Prepare and Share Draft Report of Evidence

- Before completing the Investigative Report, provide a ***Draft Report of Evidence and Attachments*** to both parties and their advisors, if any, via electronic format or a hard copy.
- Provide the parties and advisors, if any, with at least 10 days to review the Draft Report of Evidence and Attachments & submit written responses
- Share any new evidence with the parties and continue the investigation related to new information, if needed
- Consider and incorporate new information and responses in the ***Final Investigative Report***

## Investigation, continued

### 8. Investigator Prepares Final Investigative Report

- Fairly summarize relevant evidence
- Relevant evidence may include credibility assessments

### 9. Provide Investigative Report to Parties

- At least 10 days prior to a hearing or other time of determination regarding responsibility, send the investigative report to each party and the party's advisor, if any, in an electronic format or a hard copy, for their review and written response
- Review parties' written response(s), revise investigation report if needed, and attach written response(s) to the Investigative Report

## Informal Resolution Process

### 1. Optional Process per §106.45(b)(9)

- May use informal resolution process on a case-by-case basis after formal complaint is filed

### 2. Informed, Mutual Consent

- Both parties must give voluntary, informed, and written consent but cannot be required as a condition of enrollment/employment

### 3. Right to Withdraw from Informal Process

- Either party can withdraw from informal process at any time and resume formal process

### 4. Not Suitable for Student vs. Employee Matters

- No informal process for allegations that an **employee** harassed a student

## Recordkeeping

### 1. A recipient must maintain records for 7 years, including records of:

- Each sexual harassment investigation, including:
  - Determination regarding responsibility
  - Audio or audiovisual recording or transcript, if any, for K-12
  - Any disciplinary sanctions imposed on Respondent, if applicable
  - Any remedies provided to Complainant, if applicable

# RETALIATION

## Retaliation

### 1. Section 106.71(a) – Retaliation Prohibited

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in an investigation, proceeding, or hearing.

### 2. Avoiding the Title IX Process May Be Retaliation

- If the alleged behavior falls under Section 106.30 definitions, a recipient cannot use the student conduct process as a way to avoid the rigorous Title IX grievance procedures; such a decision may constitute retaliation.

### 3. Retaliation Complaints Filed Under Same Process

- Retaliation complaints may be filed under the Section 106.8(c) grievance process.

## Hypotheticals 1-3

- 1. Student A offers to name Student B the Competition Chair of the Robotics Club if Student B kisses Student A.**
  - Is this sexual harassment under Title IX?
- 2. Teacher A offers Student B extra credit if the student buys the teacher groceries.**
  - Is this sexual harassment under Title IX?
- 3. Coach A suggests Student Player B wear tight clothes to Coach's Math Class and to practice because it will "help with the student's future prospects."**
  - Is this sexual harassment under Title IX?

## Hypothetical 1 - Discussion

- 1. Student A offers to assign Student B to be the Competition Chair of the Robotics Club if Student B kisses Student A.**
  - Is this sexual harassment under Title IX?
    - This will not qualify as "quid pro quo" harassment under Title IX because the condition must be offered by **an employee**. (But it could qualify under California law.)
    - This may also be some evidence of hostile environment sexual harassment under Title IX or California law; this warrants more questions to determine if there was additional sex-based behavior from Student A towards Student B.
    - Regardless, the student may file a complaint, and the Notice of Allegations should list all potential federal and state policy violations.

## Hypotheticals 4-5

**4. Student A enters your office and tells you that another student touched Student A's buttocks, which made Student A uncomfortable.**

- What do you need to know?
- What should you do?

**5. Student A enters your office and tells you that a teacher touched Student A's buttocks in the classroom and made a kissing sound, which scared Student A.**

- What do you need to know?
- What should you do?

## Hypothetical 4 - Discussion

**4. Student A enters your office and tells you that Student B touched Student A's buttocks, which made Student A uncomfortable.**

- What do you need to know?
  - Where did it happen? Is it on campus or in a location where recipient exercised substantial control over Student B/Respondent and the context in which the sexual harassment occurred?
  - Was the conduct based on sex? What's the nature of the touch?
  - Was the conduct against Student A's will?
- What should you do?
  - Contact Title IX Coordinator as this may be sexual harassment or other sexual acts under Title IX
  - Likely contact parents
  - Explain Title IX complaint process and how to file a formal complaint
  - Offer Supportive Measures with or without a formal complaint
  - If formal complaint filed, begin the complaint process



## Title IX 2023 Proposed Amendments

### 1. Hostile Environment Definition

- Currently, a hostile environment is when the conduct is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”
- The new regulations add “denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.” (Proposed section 106.2)

### 2. Prohibited Discrimination

- The new regulations prohibit all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. (Proposed section 106.10)
- The current regulations only address sexual harassment

## Title IX 2023 Proposed Amendments

### 3. Educational Program or Activity

- Currently, Districts are not required to address a sex-based hostile environment in the education program or activity if the conduct occurs outside of the education program or activity.
- Under the new regulations, “education program or activity” includes “conduct that occurs off-campus when the respondent is a representative or otherwise engaged in conduct under the recipient’s disciplinary authority.” (Proposed section 106.11)

### 4. Responding to Complaints

- The current regulations require a District to respond to allegations of sexual harassment when it has “actual knowledge” of the harassment in a manner that is not “deliberately indifferent.”
- The new regulations require all Districts to operate their education programs or activities free from prohibited sex discrimination/harassment. This includes taking prompt and effective action to end any prohibited sex discrimination/harassment that has occurred. (Proposed section 106.44(a))

# Question & Answer Session

## Disclaimer

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Through the power of teamwork, diverse minds can achieve greatness together.

Jacqueline Hang represents California public school districts, community college districts, and county offices of education in all areas of general education law; employment matters such as discrimination, harassment, dismissal, and reasonable accommodation requirements; student discipline issues such as harassment and bullying charges; and First Amendment rights. Ms. Hang conducts workplace investigations for public school districts, and provides legal counsel on matters involving human resources and student services. She is also a member of the firm's Title IX group. In addition, she provides counsel for a full range of legal issues relating to charter schools, including operational compliance review and monitoring, complaint investigations, petitions and appeals, and operating agreements.

### Publications

Ms. Hang contributes to the firm's school law publications.

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Education  
Employee Performance & Evaluation  
Equity in Education/Office for Civil  
Rights  
Investigations  
Student Discipline

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# Title IX Investigator Training: For K-12 Districts

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**October 16, 2023**

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# Title IX Investigator Training for K-12 Districts

Title IX Investigator Training

SESSION ONE

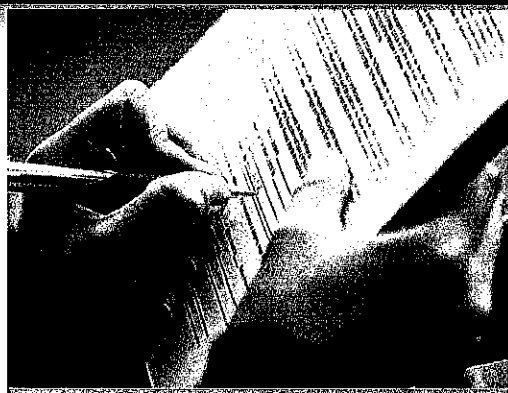
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## Agenda

- Definitions for Training
- Review Title IX Investigator Roles
- Introduce the Hypothetical & Investigation Plan
- Plan the Investigation & Prepare for Interviews
- Interviewing Tips
- Weigh the Evidence & Determine Disputed and Undisputed Issues
- Application to Hypothetical



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## Review Title IX Investigator Roles

- Presume Respondent is *not responsible* for the alleged conduct
- Complainant and Respondent do *not* have the burden of proof or the burden to gather sufficient evidence
- Provide written notice for all interviews with sufficient time for a party to prepare to participate with advisor
- Do not give confidentiality admonishments to Complainant or Respondent; consider advising against tampering with evidence or witnesses
- Provide parties with equal opportunity to present witnesses, including expert witnesses and other inculpatory and exculpatory evidence
- Do not gather privileged information without voluntary, written consent (e.g., physician or psychiatrist records, etc.)

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Inculpatory - DID happen  
Exculpatory - DID NOT happen

## REVIEW HYPOTHETICAL & INVESTIGATION PLAN

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## Create an Investigation File

- Paper file, binder with tabs, electronic file, etc.
  - Section for Formal Complaint, Supportive Measures, Notice of Allegations, Policies/Regulations, Definitions, etc.
  - Section for Investigation Plan and updates
  - Section for communication with Complainant/Advisor, Respondent/Advisor, Witnesses, Title IX Coordinator
    - Phone/email log
    - Notice of Interview for parties/advisors
    - Notice to extend timelines
  - Section for each party and witness with interview notes, draft witness summary, final witness summary, and list of evidence submitted
- Create a timeline for investigation, calendar important dates, and foresee holidays, office closures, and busy times

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## Create a Timeline for the Hypothetical *60 Days under UCP*

- Looking at a calendar, assume you have **45 calendar days from October 6, 2020**, to complete your investigation, exchange evidence (10 days), and deliver the Final Investigative Report to the parties and their advisors (if any) to review and provide written responses (10 days)
- Calendar your goals to complete the following tasks:
  - Date to complete all interviews and gather evidence
  - Date to complete witness statements (signed statement process optional)
  - Date to send Draft Report of Evidence to the parties and their advisors
  - Date to send Final Investigative Report to parties and their advisors
  - Date to send Final Investigative Report with attached written responses to Title IX Coordinator & Decision-Maker

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## Prepare Interview Introduction & Advisements

### • Sample Introductory **Comments** by Investigator

- Introduce yourself and your role:
  - Review the complaint and relevant policies
  - Interview witnesses
  - Gather and review relevant and directly related evidence on all sides
  - Ask follow-up questions, as needed
  - Weigh the evidence and determine what is undisputed or in dispute
  - Maintain confidentiality **outside** of the complaint process
  - **For Complainant and Respondent:** Provide the parties and advisors with a Draft Report of Evidence and then a Final Investigative Report which fairly summarizes the relevant evidence, both for review and comment

## Prepare Interview Introduction & Advisements

### • Sample Introductory **Instructions** for Parties and Witnesses

- Listen carefully to questions, answer truthfully, and be forthcoming with relevant information
- We want evidence in its best, most original form, so do not tamper with any evidence (give examples of tampering)
- Retaliation is against the law and policy. Please report retaliation to Title IX Coordinator or Supt and do not retaliate against anyone involved in this process
- **For witnesses only:** Maintain confidentiality about the identities of the parties or witnesses and the information revealed during the interview
- **For advisors only:** Discuss protocols established by educational institution, such as not answering for a party, not interrupting questions or answers, asking for a break after an answer and before next question, confidentiality, etc.



## Trauma-Informed Interviewing Tips

- Complainant, Respondent, and/or Witnesses may experience some type of discomfort or trauma related to the allegations or involvement in a Title IX complaint and investigation
- Consider the tone of your communications and questions
  - Are you showing respect to all people involved in the investigation?
  - Are you empathetic about the difficulty of this process?
  - Are you compassionate about what it's like to be in this situation?
  - Are you exhibiting patience?
- Investigator's ***goal is to objectively and thoroughly gather relevant evidence with a respectful and compassionate demeanor***

## Initial Questions

- After the introduction and advisements, consider asking routine **questions to “warm-up”** and provide an opportunity to observe any baseline communication patterns. Sample questions:
  - What grade/year are you? What are you studying? What class are you missing right now? What are your plans after graduation?
  - What is your job title? How long have you worked in that position? Who is your supervisor? What are your general job responsibilities?

## Listen Closely & Follow-up

### Example:

- Q: When did it happen? A: Yesterday.
- Q: What time yesterday? A: Fourth period.
- Q: What time of day was that exactly? A: About 11:50 a.m.
- Q: Where did it happen? A: At school.
- Q: Where at school? A: On the yard.
- Q: Where on the yard? A: Right by the hopscotch court.
- Q: Who was there? A: My friends.
- Q: What are your friends' names? A: Quentin and Jeremy.
- Q: What are their last names? A: Quentin James and Jeremy Brown.

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## Listen Closely & Follow-up

- When you listen closely, you may notice gaps in the Party's or Witness's statements. Ask follow-up questions to fill in those gaps. Some examples:
  - **"Before I knew it,** Respondent was fondling my breast."
  - **"Eventually,** Respondent told me what I was supposed to do."
  - **"After a while,** I knew what Complainant wanted."
  - **"One thing led to another,** and Respondent touched my private area."
- Ask questions to elicit additional information

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## Types of Questions for Investigator to Avoid

- Avoid **leading** questions
  - “You felt helpless, didn’t you?”
  - “You wanted to be there, didn’t you?”
  - “They are treating you this way because of your gender and skin color, right?”
- Avoid **negative** questions
  - “You don’t know the password, do you?”
- Avoid **compound** questions
  - “What time did you arrive, and how long were you there?”
- Avoid **vague** questions
  - “Why is that?”

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## Summary: How to Get the Most Out of an Interview

Ask the right questions	Be a good, impartial listener and keen observer	Ask witness to demonstrate	Document	Be prepared to assess credibility
<ul style="list-style-type: none"> <li>• Begin with narrative questions</li> <li>• Ask who, what, where, when, why, and how questions</li> <li>• Ask specific questions to elicit key information</li> </ul>	<ul style="list-style-type: none"> <li>• Notice vague answers</li> <li>• Ask follow-up questions</li> <li>• Repeat the questions if witness fails to answer</li> <li>• Observe unusual non-verbal cues &amp; ask more questions</li> </ul>	<ul style="list-style-type: none"> <li>• If appropriate:                             <ul style="list-style-type: none"> <li>• Have witness demonstrate the behavior</li> <li>• Tour the scene of the incident with you</li> <li>• Ask witness to draw a diagram</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Take thorough notes of questions and answers</li> <li>• Consider creating written summaries for parties &amp; witnesses to review &amp; sign, (depending on policy, regs, or procedures)</li> </ul>	<ul style="list-style-type: none"> <li>• Make note of consistent and inconsistent statements</li> <li>• Corroboration</li> <li>• Inherent plausibility or lack thereof</li> <li>• Recognize bias, motive to falsify</li> </ul>

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## Prepare Interview Notes and/or Summaries

- **Review interview notes** as soon as possible
  - Schedule time after each interview to review notes
  - Fill-in abbreviated words & sentences, correct spelling & grammar, clarify vague pronouns, add correct names, note your relevant observations
  - Do not add or embellish information that was not discussed
  - Make a list of any questions missed or areas needing clarification; seek follow-up information
- **OPTIONAL:** Create a typed, double-spaced witness summary for Complainant, each Witness, and Respondent; consider using a format with numbered lines in margin
  - Send Draft Witness Summary to Complainant/Advisor, each Witness, and Respondent/Advisor with directions to review, edit mistakes, sign, and return
  - Keep track of any substantive changes and/or comments

**WEIGH THE EVIDENCE &  
DETERMINE DISPUTED AND  
UNDISPUTED ISSUES**

## Important Definitions Regarding Evidence

- **Direct Evidence**
  - Evidence in the form of testimony from a **witness who actually saw, heard, touched, tasted, or smelled the subject of questioning**. Evidence, which if believed, proves existence of a fact in issue without inference or presumption.
- **Circumstantial Evidence**
  - Testimony which is *not* based on actual personal knowledge or observation of the facts in dispute, but testimony of **other facts from which deductions are drawn, showing indirectly the facts sought to be proved**. Inferences drawn from facts proved.
- **Corroborating Evidence**
  - Evidence **supplementary** to that already given and **tending to strengthen or confirm it**. Additional evidence of a different character to the same point.

## Credibility Factors to Weigh Disputed Evidence

- Actual Knowledge/Opportunity to Observe or not Observe
- Inherently Plausible or Implausible
- Direct or Indirect Corroboration
- Consistent or Inconsistent Statements
- Material Omission or Material Admissions

# Question & Answer Session

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While in law school, Ms. Quintana was awarded the Dean's Service Award and was part of multiple organizations, including serving as Co-President of La Raza de Loyola, Immigration Law Society and the Public Interest Law Foundation. Ms. Quintana was awarded scholarships from Loyola Law School, the Mexican American Bar Foundation, and the Latina Lawyers Bar Association. Prior to attending law school, she was an elementary school teacher at districts in both Northern and Southern California.

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Anna Miller represents public school districts and California community college districts in all areas of general education law; labor relations; employment matters such as discrimination, dismissal and harassment; student issues such as fraudulent receipt of federally issued financial aid, grade disputes, student discipline and harassment charges; and First Amendment rights. She is active in the firm's Title IX group, conducting Title IX investigations and giving presentations on Title IX issues.

Ms. Miller conducts complex workplace investigations for both public and private sector entities, including universities and colleges, school districts, public safety entities, counties and cities; and provides legal counsel on matters involving safety, campus police and human resources. In addition, she has a wealth of experience representing clients in court, arbitration proceedings and administrative hearings.

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Ms. Miller frequently gives presentations about Title IX, employment issues, student matters, and other legal topics.

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### **PRACTICE AREAS**

Education  
Student Discipline  
Workplace Training



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# 2023 Title IX Training Academy – Module 2

## Title IX Investigator Training for School Districts & County Offices

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### Part 2

October 23, 2023

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## Reminder: Title IX Investigator Roles

### Investigator Role:

- Prepares and provides a ***Draft Report of Evidence and Attachments*** to Complainant/Advisor & Respondent/Advisor for review and comment; investigator gathers more evidence and/or revises, as needed
- After considering responses, prepares and provides ***Final Investigative Report*** to Parties/Advisors for review and comment; report describes relevant disputed and undisputed material facts
- Investigator does ***not*** make factual findings or decision about whether Respondent has engaged in sexual harassment

## BUILD A DRAFT REPORT OF EVIDENCE AND ATTACHMENTS

## Contents of Draft Report of Evidence and Attachments

- Body of Report with Headings, continued
  - **Investigative Background**
    - List witnesses interviewed
      - Note unavailable witnesses & efforts to reach, refusals to participate, or decisions not to interview
      - Note advisor names, if any
      - Note any advisements, protocols, releases, and/or agreements, if any
    - List documents reviewed, released, unavailable, withheld, or not sought
    - List evidence not considered, not released, unavailable, withheld, or not sought
      - Examples may include audio/visual information, previously deleted evidence, or privileged information (e.g., mental health files, SANE evidence, etc.)

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## Contents of Draft Report of Evidence & Attachments

- Body of Report with Headings, continued
  - **Investigative Background**
    - Relevant Policies and Procedures/Regulations guiding the investigation
      - Summarize and/or quote relevant parts
    - Evidentiary Standard for the Complaint Process
      - Preponderance of the Evidence or Clear and Convincing Evidence
    - Independence of the Investigator
    - Timing or Duration Issues
    - Other, if needed
    - *Type of Writing*: Demonstrates impartiality, fairness, and thoroughness of your investigation methods & your consideration of issues raised; preemptively addresses various reader questions (parties, decision-maker, appeal officer, etc.)

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## SHARE DRAFT REPORT OF EVIDENCE WITH PARTIES AND ADVISORS

## Do you Need Consent & Release Agreements?

- Consider seeking Student/Parent Acknowledgement of the District's requirement to Share Evidence with Parties and Advisors within the Title IX process
- Optional: Seek written consent from Complainant for the District to speak with to the Respondent and both party advisors about the specific Title IX complaint process
- Optional: Seek written consent for the District to provide the Parties and Advisors with the opportunity to review the Draft Report of Evidence and Attachments or other confidential documents
- Overall goal: Assert authority or seek permission to review confidential pupil records within the Title IX complaint process and to maintain confidentiality outside of the Title IX complaint process

## Consider Logistics of Electronically Sharing Evidence

- Sharing the Draft Report of Evidence and Attachments Electronically
  - The goal is to allow the review of evidence with tools to maximize the confidentiality of the information and minimize the ability to share the confidential information or documents with people other than advisors
  - Consult IT staff about electronic options available within your organization
  - Electronic options may include, but are not limited to:
    - Dropbox
    - Google Drive
    - Adobe
    - One Hub
    - Box
    - Lock Lizard
    - One Drive

## Consider Logistics of Physically Sharing Evidence

- Sharing a Physical Copy of the Draft Report of Evidence and Attachments
  - The goal is to provide a physical review of evidence while maximizing confidentiality and minimizing the ability to share confidential information or documents with people other than advisors
  - Provide physical documents for review on-site during arranged times
  - Locations may include conference room, empty classroom, after hours in library, or other office space
- Allow multiple opportunities and lengths of time for review
- Retrieve the physical documents after each review, and provide the same physical documents for additional reviews

## Final Investigative Report - Overview

- Prepare a ***Final Investigative Report*** that fairly summarizes the **relevant evidence**
  - Relevant evidence includes the ***who, what, where, when, why, and how*** information for each ***material*** allegation within the scope of the investigation
  - Relevant evidence *may* also include pointing out the weight of the evidence related to consistency/inconsistency, corroboration/lack of corroboration, plausibility/improbability, opportunity/lack of opportunity to observe, and material omissions or admissions
- The Final Investigative Report helps the Decision-Maker understand the relevant evidence in order to help the Parties engage in written cross-examination and to ultimately make factual findings & a decision

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## Contents of Final Investigative Report

- Similar Organization of Draft Report and duplication
- Amend Title of Cover Page
- Mostly the Same Headings as the Draft Report
  - **Introduction**
  - **Investigative Background**
    - Update the Investigative Background to include the Party's feedback and any new evidence
  - **Evidence Regarding Allegations**
    - Update the Evidence Section with any new evidence obtained by the Parties or Witnesses
  - **Fairly Summarize the Relevant Evidence for the Parties and Decision-Maker**
  - **Identify Undisputed and Disputed Material Facts**
    - Mention Investigator's observations about the weight of the evidence

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## Conclusion: Seek Assistance When Needed

- The Title IX regulations and the Office for Civil Rights' commentary and Q&A Documents include extensive, complex, and legalistic principles
- When in doubt, consider seeking:
  - Additional training opportunities
  - Advice from legal counsel
  - Opportunities to shadow an experienced investigator
  - Legal counsel review of your Draft Report of Evidence or your Final Investigative Report
  - Outside, trained professionals to investigate for your educational entity

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# Question & Answer Session

23

## Jacqueline D. Hang

Senior Associate  
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Through the power of teamwork, diverse minds can achieve greatness together.

Jacqueline Hang represents California public school districts, community college districts, and county offices of education in all areas of general education law; employment matters such as discrimination, harassment, dismissal, and reasonable accommodation requirements; student discipline issues such as harassment and bullying charges; and First Amendment rights. Ms. Hang conducts workplace investigations for public school districts, and provides legal counsel on matters involving human resources and student services. She is also a member of the firm's Title IX group. In addition, she provides counsel for a full range of legal issues relating to charter schools, including operational compliance review and monitoring, complaint investigations, petitions and appeals, and operating agreements.

### Publications

Ms. Hang contributes to the firm's school law publications.

### Community & Professional

- Sacramento County Bar Association, Member
- Asian Pacific Bar Association of Sacramento, Member
- National Asian Pacific American Bar Association, Member

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Board Governance  
Charter Schools  
Discrimination & Harassment  
Education  
Employee Performance & Evaluation  
Equity in Education/Office for Civil  
Rights  
Investigations  
Student Discipline



**Hypothetical for Title IX Investigators' Training**

The Title IX Coordinator asked you to conduct a Title IX investigation. The **Complainant is a 9<sup>th</sup> grade student** and the **Respondent is a 10<sup>th</sup> grade student**. They know each other from attending the alternative high school, and they both receive pull-out speech services in a small group setting. You reviewed the **Notice of Allegations** sent to the parties, and the summary of allegations states:

*On or about August 21, 2020, Respondent tutored Complainant after school in the library. Respondent put a hand on Complainant's knee, made comments about sexual acts, and then touched Complainant's groin area. When Complainant moved away, Respondent moved towards Complainant. Complainant immediately left the library.*

The Title IX Coordinator provided you with **Complainant's allegations** from the formal complaint:

1. During the 2020-21 school year, Respondent and Complainant were friendly during speech sessions, and Complainant felt like Respondent flirted by looking and smiling at Complainant a lot. Respondent often waited for Complainant after speech so they could walk back to towards their classrooms.
2. On August 17, 2020, Respondent asked for Complainant's Snap, and Complainant provided it to Respondent. Later that day, Respondent sent Complainant a message saying, "you slay." Complainant responded "you extra." U
3. Complainant struggled in algebra. Respondent heard Complainant complain about math and offered to tutor Complainant after school in the library. Complainant said yes. Respondent helped Complainant with math homework on August 20th for about 20 minutes. They decided to meet again on August 21st because there was a quiz scheduled for August 24th. U
4. On August 21, 2020, Complainant and Respondent went to the library after school. The library was empty, and the librarian was working on the computer. U Respondent chose a table far away from the librarian. U After they sat down and started looking at a review sheet, Respondent said that algebra was "messed-up." Complainant agreed and laughed. Respondent placed a hand on Complainant's right knee and said they should "smash." When Complainant looked confused, Respondent's hand quickly moved up Complainant's leg, and Respondent's hand grabbed Complainant's groin area on the outside of Complainant's jean shorts. Respondent said, "You know, *smash*." Complainant moved away from Respondent by shuffling the chair away, but Respondent leaned towards Complainant and kept a hand on Complainant's upper inner thigh. Respondent said, "You'll like it, I promise." Complainant stood up, faltered while moving the chair, and quickly left without taking the review sheet. Complainant walked home. D
5. Complainant failed the Algebra quiz on August 24, 2020, and was absent due to illness for the next 4 days. While Complainant was home sick, Complainant's parents asked what was wrong, but Complainant did not want to talk about it.
6. Complainant told a friend, Riley, on August 31, 2020 that Respondent was shady. Riley asked questions, but Complainant refused to answer, even though Complainant seemed upset.
7. On September 28, 2020, Complainant saw Respondent standing really close to Riley. That night Complainant told Complainant's parents more about what happened on August 21, 2020 in the

## IDENTIFICATION OF DISPUTED AND UNDISPUTED EVIDENCE

<p>Respondent flirted with Complainant                   DISPUTED as to flirty, but UNDISPUTE D as to friendly</p>	<p>They were "friendly" during speech; Respondent "flirted" by looking and smiling at Complainant "a lot"; Respondent "often" waited for Complainant after speech and walked together back to class (#1 of complaint)                   Respondent asked Complainant for Snapchat handle; wrote to Complainant on same day with phrase: "you slay," (#2 of complaint). Complainant responded as if a good comment.</p>	<p>Respondent smiled at Complainant "maybe once." Walked back to class after speech "one time." Friendly, but "not flirty." Considered Complainant a "younger sibling." (A and B of written response.)                   Respondent wrote "you slay" because Complainant did well in the speech session (C of written response).</p>	<p>-Video evidence?                  -Librarian observations not likely without clear visual of their table and without closer proximity to hear voices                  -What is common understanding for this age group about meaning of "you slay?"</p>



**Hypothetical for Title IX Investigators' Training**

**CONFIDENTIAL**

***Delivered in Person***

October 6, 2020

Re: Notice of Allegations

Dear Respondent and Parents of Respondent:

On October 1, 2020, the County Office of Education (COE) received a formal complaint against you, Respondent, alleging that you sexually harassed Complainant on August 21, 2020 while in the school library. The purpose of this letter is to notify you of the allegations against you, the relevant policies, your supportive measures, your rights and responsibilities, and the COE's complaint process.

**Allegations.** The Complainant alleges that Respondent engaged in the following conduct:

*On or about August 21, 2020, Respondent tutored Complainant after school in the library. Respondent put a hand on Complainant's knee, made comments about sexual acts, and then touched Complainant's groin area. When Complainant moved away, Respondent moved towards Complainant. Complainant immediately left the library.*

As a Respondent, you are presumed *not* to be responsible for the alleged misconduct listed above unless and until a trained, impartial, non-biased decision-maker reaches a different determination. If additional allegations are revealed during the investigation, this office will provide Complainant and Respondent with an additional written notice.

**Potential Policy Violations, Corrective Action and/or Sanctions.** These allegations, if found to have occurred, may violate the policies listed below:

- ***Sexual harassment in the form of unwelcome physical and verbal conduct on the basis of sex*** as defined in Administrative Regulation (AR) 5145.71 and Title IX regulations 34 CFR Part 106, §106.30(a). ***Sexual Harassment Definition-*** Unwelcome conduct

**Hypothetical for Title IX Investigators' Training**

**Supportive Measures.** As discussed on the telephone, we agreed to provide you with supportive measures during the complaint process, including your request for a two-week extension of your Spanish project deadline, a weekly check-in with your counselor, a referral to off-campus counseling options for your family to explore at their own cost, and a change in the time of your pull-out speech services. If at any time, these supportive measures need adjustment or you feel you need additional support, please speak with your counselor or contact my office as soon as possible.

**Rights and Responsibilities.** As noted above, during this complaint process, the Respondent is presumed *not* to be responsible for the alleged misconduct unless and until a trained, impartial, non-biased decision-maker reaches a different determination. The decision-maker, Principal Jones<sup>1</sup>, will not make a determination of responsibility until after an investigation where the Complainant and Respondent will be given an opportunity during the review and comment period to review all directly related and/or relevant evidence obtained during the investigation.

The Complainant and Respondent may each have an advisor of their choice, who may be, but is not required to be, an attorney. The advisor may be present for any meeting, interview, or hearing during this complaint process, and the advisor may inspect and review any evidence obtained as part of the investigation. The advisor may assist with any written question and/or written cross-examination process.

The COE prohibits the Complainant, Respondent and any witness from knowingly making false statements or knowingly submitting false information during the complaint process. (See AR 5145.71.)

**Investigation Process.** The COE has assigned an Investigator, Assistant Principal Lee<sup>2</sup>, to investigate the sexual harassment allegations reported by Complainant.

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<sup>1</sup> If you believe Principal Jones has a general or specific conflict of interest or bias related to this complaint process, please contact me to discuss within 3 school days after receiving this letter.

<sup>2</sup> If you believe Assistant Principal Lee has a general or specific conflict of interest or bias, please contact me to discuss within 3 school days after receiving this letter.

**Hypothetical for Title IX Investigators' Training**

**Decision-Maker and Determination of Responsibility.** After the parties' review and comment period, the COE will provide the Final Investigative Report to Principal Jones, the Decision-Maker. Before the Decision-Maker reaches a determination regarding responsibility, the Complainant and Respondent will have the opportunity to submit written, relevant questions that a party wants the Decision-Maker to ask of another party or witness. The Decision-Maker will provide Complainant and Respondent with the answers, and allow for additional, limited follow-up questions from Complainant and Respondent. The Decision-Maker must explain any decision to exclude a question as not relevant.

After considering the Final Investigative Report and the answers to the written questions, the Decision-Maker will issue a written determination regarding responsibility. The Decision-Maker will make findings of fact, reach conclusions, explain the rationale, and determine whether policy has been violated based on a preponderance of the evidence standard (i.e. "it is more likely than not the allegation occurred or did not occur"). The Decision-Maker may also determine sanctions against the Respondent or remedies for the Complainant, if applicable. The COE will send the Complainant and Respondent a written decision, sometimes called a Notice of Outcome. The Notice of Outcome will explain how each party can file an appeal.

If a finding is made that Respondent has not violated the COE's policies, then the investigation will be closed, but the Complainant may still receive Supportive Measures. If a finding is made that Respondent violated COE policy, the matter will be referred to the applicable administrator, who will review the Decision-Maker's decision and applicable corrective or disciplinary sanctions to be implemented against Respondent for violation of the policy and remedies for the Complainant. Regardless of the outcome of the investigation, the COE shall determine whether additional actions are needed to prevent or address any issues discovered during the investigation. After exhausting any appeal procedure, the COE will implement the sanctions for Respondent and remedies for Complainant, if any.

**Timelines.** The COE endeavors to complete the investigation and complaint process within reasonably prompt time frames, typically within 45-90 calendar days from date the formal complaint was filed. If the COE has good cause to extend the time lines, the COE will provide

The logo consists of the lowercase letters 'aa/r/r' in a serif font, enclosed within a white rounded rectangular border.

Title IX

**Hypothetical for Title IX Investigators' Training**

If you have any additional questions during the complaint process, please do not hesitate to contact me at (916) 923-1200 during school hours or send me an email at [cbbaxterTIXC@COE.edu](mailto:cbbaxterTIXC@COE.edu).

Sincerely,

CB Baxter  
Title IX Coordinator

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2023 Title IX Training Academy – Module 3

# Title IX Decision-Maker Training for School Districts & County Offices

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## Part 1

November 6, 2023

Presented by:

Eve Fichtner, Partner  
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## Definitions for Training

- Complainant/Respondent
- Parties
- Witness
- Advisor
- Grievance Process
- Final Investigative Report
- Written Cross-Examination Questions
- Determination of Responsibility

## Title IX Team: Decision-Maker

### Decision-Maker Role:

- Reviews Final Investigative Report with “fresh eyes” to see if information is missing or incomplete
- – Facilitates relevant written questions & “cross-examination” from parties for parties and witnesses; must be trained on issues of relevance
- Reviews all evidence, identifies the disputed issues, and weighs the evidence

## Review Final Investigative Report

- **Review your Title IX Board Policies and/or Administrative Regulations**

- Look at the policies and regulations cited in the Final Investigative Report and the Notice of Allegations
- Review your role as Decision-Maker, and determine the scope of your decision
  - Are you deciding if there is a preponderance of evidence to find quid pro quo sexual harassment, hostile environment sexual harassment, sexual assault, fondling, stalking, and/or dating violence, etc. under the Title IX administrative regulations? (Federal Law)
  - Are you deciding if there is a preponderance of evidence to find quid pro quo sexual harassment, hostile environment sexual harassment, sexual assault, and/or sexual battery, etc. under the Board Policies prohibiting sexual harassment? (State Law)

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## Review Final Investigative Report

- **Read Final Investigative Report and Review Attachments**

- Take notes, highlight important areas, and create a list of questions (if any)

- **Calendar timelines to accommodate these phases:**

- Time to ask questions of Parties and exchange written “cross examination” questions between Parties or from the Parties to witnesses
- Time to analyze the evidence, write the decision, and allow Title IX Coordinator, administrator or legal advisor to review the decision for thoroughness and readability
- Deliver written decision to the Complainant, Respondent, Advisors (if any), and Title IX Coordinator with notice of appeal rights

- **Plan and Schedule the Process with the Parties**

- If needed, seek help from Title IX Coordinator to schedule and plan logistics

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## FACILITATE WRITTEN QUESTIONS BETWEEN PARTIES OR FOR WITNESSES

### Written Questions Between Parties

**Before making a decision about responsibility, the Decision-Maker must facilitate a question process:**

The Decision-Maker must afford *each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness*, provide each party with the answers, and allow for additional, limited follow-up questions from each party. (34 CFR 106.45(b)(6)(ii).)

Purposes for the questions may include:

- The opportunity for the parties to seek information that may shed light on someone's credibility
- The opportunity for the Decision-Maker to ask questions and observe the credibility of Complainant, Respondent and witnesses, since the Decision-Maker did not conduct the investigation

## Written Questions Between Parties

### Guidelines for Questions

- Questions should not be repetitive
  - Ask the party to ask another question intended to elicit different information
- Questions should be clear
  - Ask the party to clarify the question
- Avoid compound questions
  - Ask the party to separate the questions
- Avoid questions with difficult words
  - Ask the party to rephrase the question
- Avoid argumentative questions
  - Ask the party to rephrase the question

## REVIEW HYPOTHETICAL “CROSS EXAMINATION” QUESTIONS

## Discussion of Homework

### *Hypothetical* Investigative Report

- Review the evidence surrounding the touching of the knee and determine if the touch was based on "sex."
- Review the evidence related to Respondent touching the Complainant's groin area and determine whether that touching occurred.
- If you find that Respondent touched Complainant's groin, determine (1) if the touch was sexual in nature **and** (2) if Complainant permitted the touch **and** (3) if the touch was for the purpose of sexual gratification.
- Write factual findings about the touching of the knee and whether or not the Respondent touched the Complainant's groin for sexual gratification.
- Explain why you made that finding; what was your rationale.
- **GOAL:** We may disagree, but did you adequately explain your rationale?

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# Question & Answer Session

## Eve P. Fichtner

Partner

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I go beyond identifying potential legal problems. I try to anticipate our clients' strategic options which are consistent with their values.

Eve Peek Fichtner represents school districts, county offices of education, community colleges, and private employers for personnel matters, student issues, and all forms of discrimination and harassment claims. Ms. Fichtner has certification and significant experience conducting impartial, prompt, thorough, and effective workplace investigations and Title IX investigations. She also serves as a hearing officer for K-12 expulsion matters and for Title IX hearings with the University of California, the California State University system, and private universities. In addition, Eve provides resolution-based services to clients, including workplace coaching for employees and supervisors, conflict resolution training, and facilitated meetings.

Ms. Fichtner provides representation, advice, and counsel on numerous school and employment matters, including employee leave, evaluation, discipline and dismissal, student discipline, bullying, reasonable accommodation, interactive meetings, release of public records, search and seizure law, restraining orders, and motions to quash defective subpoenas. Ms. Fichtner has represented clients before state courts and administrative bodies. She has served as General Counsel to several school districts, including Davis Joint Unified School District for over ten years.

Ms. Fichtner is an experienced and effective trainer on a variety of legal issues, including Title IX sexual misconduct matters; prevention of sexual harassment, discrimination, bullying and retaliation; understanding student discipline laws; conducting internal investigations; addressing electronic misconduct; effective conflict resolution techniques; and the FRISK® Documentation Model.

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## Ashlee B. Reece-Walker

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Ashlee Reece-Walker provides counsel and representation to California public school districts, county offices, and cities in a wide variety of employment and education law matters. Ms. Reece-Walker primarily conducts investigations for school and community college districts with respect to allegations of discrimination, harassment and retaliation. She has used this experience to develop a Cultural Sensitivity Training, which she has presented to individual clients, statewide conferences and professional consortiums. Ms. Reece-Walker is also a member of the firm's Title IX Sexual Misconduct Committee. She has fulfilled the role of Investigator and Decision-Maker in Title IX matters and helps train Decision-Makers across the state of California. Additionally, Ms. Reece-Walker has successfully defended clients against charges brought by the DFEH, EEOC and PERB.

Prior to joining Atkinson, Andelson, Loya, Ruud & Romo, Ms. Reece-Walker was a labor and employment law associate for a large law firm in downtown Los Angeles where she handled matters including ADA, FEHA, wrongful termination, and Unruh Civil Rights Act litigation. Prior to working in litigation Ms. Reece-Walker was an Equity Officer at a private Jesuit research university in St. Louis, Missouri where she conducted Title VII and Title IX investigations, and trained new managers.

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Labor & Employment Law

---

2023 Title IX Training Academy – Module 3

# Title IX Decision-Maker Training for School Districts & County Offices

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## Part 2

November 13, 2023

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## Preponderance of the Evidence Standard

### Evidentiary Standard

- The evidence is reviewed, compared and analyzed under a “preponderance of the evidence” standard to determine whether the allegations were with or without merit.
  - “Preponderance of the evidence” means that evidence on one side outweighs, or is more than, the evidence on the other side.
  - More likely than not; over 50%; more than 50%
  - There is a greater than 50% chance that the allegations are accurate
  - This is a qualitative, not quantitative, standard
    - Qualitative evidence includes interviews with Complainant, Respondent, or witnesses; data or information that is expressed in terms of the meaning of acts or events

## Determination of Responsibility

### Decision-Maker Determines Responsibility per §106.45(b)(7)

- Decision-maker must issue a written determination regarding responsibility
- Decision-maker must understand the “**preponderance of the evidence**” or “clear and convincing evidence” standard
  - Most K-12 & COE’s use the “preponderance” standard
- *Reminder*: The Title IX Coordinator or investigator cannot determine responsibility

## Determination of Responsibility

### Written Determination must include, continued:

- The written determination must be provided to the parties simultaneously
- The determination regarding responsibility becomes final either on the date the recipient provides the parties with the written determination of the result of an appeal, (if an appeal is filed), or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

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## Table of Contents for Written Determination

- Brief Introduction
- Investigative and Decision-Making Background
- Factual Findings
  - **Nature of Parties' Relationship Prior to August 21, 2020**
    - Factual Finding: I find by a preponderance of the evidence that, between August 5-19, 2020, Complainant and Respondent interacted with each other in a [friendly/flirty] way when [describe actions]. These actions were [welcome/unwelcome] to Complainant.
    - Rationale for factual findings: I made these findings because I found [Complainant/Respondent] version of events to be more credible based on [explain your objective reasons why you believed one person over the other]

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## Table of Contents for Written Determination

- Conclusions about Sexual Fondling
  - Conclusion: I find by a preponderance of the evidence that Respondent's actions [do/do not] rise to the level of sexual fondling as defined by [code of conduct/policy].
  - Rationale: I reach this conclusion because Respondent [touched/did not touch] a private area of Complainant's body when placing a hand on Complainant's genital area [with/without] permission. The facts further demonstrated that Respondent touched Complainant [accidentally/for the purposes of sexual gratification].

## Table of Contents for Written Determination

- Conclusions about Sexual Harassment
  - Conclusion: I find by a preponderance of the evidence that Respondent's actions [do/do not] rise to the level of sexual harassment as defined by [code of conduct/policy].
  - Rationale: I reach this conclusion because Respondent [did/did not] engage in unwelcome physical and verbal conduct based on sex towards Complainant, which determined by a reasonable person would be regarded as severe, pervasive, and objectively offensive.
- Responsibility
  - Based on a thorough review of the evidence, I find by a preponderance of the evidence that Respondent [is/is not] responsible for [sexual fondling and/or sexual harassment].

## Discussion of Homework

### *Hypothetical* Investigative Report

- Review the evidence surrounding the touching of the knee and determine if the touch was based on “sex.”
- Review the evidence related to Respondent touching the Complainant’s groin area and determine whether that touching occurred.
- If you find that Respondent touched Complainant’s groin, determine if the touch was sexual in nature **and** if Complainant permitted the touch **and** if the touch was for the purpose of sexual gratification.
- Write factual findings about the touching of the knee and whether or not the Respondent touched the Complainant’s groin for sexual gratification.
- Explain why you made that finding; what was your rationale.
- **GOAL:** We may disagree, but did you adequately explain your rationale?

**aalrr**

14

# Question & Answer Session

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I go beyond identifying potential legal problems. I try to anticipate our clients' strategic options which are consistent with their values.

Eve Peek Fichtner represents school districts, county offices of education, community colleges, and private employers for personnel matters, student issues, and all forms of discrimination and harassment claims. Ms. Fichtner has certification and significant experience conducting impartial, prompt, thorough, and effective workplace investigations and Title IX investigations. She also serves as a hearing officer for K-12 expulsion matters and for Title IX hearings with the University of California, the California State University system, and private universities. In addition, Eve provides resolution-based services to clients, including workplace coaching for employees and supervisors, conflict resolution training, and facilitated meetings.

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Ms. Fichtner is an experienced and effective trainer on a variety of legal issues, including Title IX sexual misconduct matters; prevention of sexual harassment, discrimination, bullying and retaliation; understanding student discipline laws; conducting internal investigations; addressing electronic misconduct; effective conflict resolution techniques; and the FRISK® Documentation Model.

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Rights  
Investigations  
Student Discipline  
Workplace Training

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Ashlee Reece-Walker provides counsel and representation to California public school districts, county offices, and cities in a wide variety of employment and education law matters. Ms. Reece-Walker primarily conducts investigations for school and community college districts with respect to allegations of discrimination, harassment and retaliation. She has used this experience to develop a Cultural Sensitivity Training, which she has presented to individual clients, statewide conferences and professional consortiums. Ms. Reece-Walker is also a member of the firm's Title IX Sexual Misconduct Committee. She has fulfilled the role of Investigator and Decision-Maker in Title IX matters and helps train Decision-Makers across the state of California. Additionally, Ms. Reece-Walker has successfully defended clients against charges brought by the DFEH, EEOC and PERB.

Prior to joining Atkinson, Andelson, Loya, Ruud & Romo, Ms. Reece-Walker was a labor and employment law associate for a large law firm in downtown Los Angeles where she handled matters including ADA, FEHA, wrongful termination, and Unruh Civil Rights Act litigation. Prior to working in litigation Ms. Reece-Walker was an Equity Officer at a private Jesuit research university in St. Louis, Missouri where she conducted Title VII and Title IX investigations, and trained new managers.

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### INDUSTRIES

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### EDUCATION

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### ADMISSIONS

2019, California  
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### PRACTICE AREAS

Investigations  
Labor & Employment Law

aa/rrr

Title IX

*Hypothetical*

**CONFIDENTIAL**

**FINAL INVESTIGATIVE REPORT<sup>1</sup>**

Title IX Investigation Report  
Concerning Complainant and Respondent

Prepared by: Assistant Principal Lee, Investigator  
November 9, 2020

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<sup>1</sup> *This hypothetical investigation report is not based on an actual complaint. The report is provided for instructional purposes only, it is not a complete report, and it purposefully includes unclear information in certain areas. While the organization of the report may be useful for the audience, each report should be organized in a way that is appropriate for the scope of the specific complaint investigated by the educational institution. Please excuse any typographical errors.*

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from the librarian. After they sat down and started looking at a review sheet for math, and Respondent said that algebra was “messed-up.” Complainant laughed and agreed. Respondent placed a hand on Complainant’s right knee and said they should “smash.” When Complainant looked confused, Respondent’s hand quickly moved up Complainant’s leg, and Respondent’s hand grabbed Complainant’s groin area on the outside of Complainant’s jean shorts. Respondent said, “You know, smash.” Complainant moved away from Respondent by shuffling the chair away, but Respondent leaned towards Complainant and kept a hand on Complainant’s upper inner thigh. Respondent said, “You’ll like it, I promise.” Complainant stood up, faltered while moving the chair, and quickly left without taking the review sheet. Complainant walked home.

5. Complainant failed the Algebra quiz on Monday, August 24, 2020, and was absent due to illness for the next 4 days. While Complainant was home sick, Complainant’s parents asked what was wrong, but Complainant did not want to talk about it.
6. Complainant told a friend, Riley, on August 31, 2020 that Respondent was shady. Riley asked questions, but Complainant did not answer because Complainant irritated.
7. On September 28, 2020, Complainant saw Respondent standing really close to Riley. That night Complainant told Complainant’s parents more about what happened on August 21, 2020 in the library. Complainant’s parents called the Principal, and the Principal put them in touch with the Title IX Coordinator. On October 1, 2020, Complainant and Complainant’s parents met with the Title IX Coordinator and filed a formal Title IX complaint.

### **B. Notice of Allegations**

The Title IX Coordinator delivered a Notice of Allegations (“NOA”) to Complainant, Respondent, and their respective parents/guardians via email on October 5, 2020.

### **C. Title IX Coordinator Meeting with Respondent**

The Title IX Coordinator met with the Respondent on October 6, 2020. Respondent submitted a written response during their meeting. Information about the meeting with the Title IX Coordinator and the Respondent’s written response are described in Section III.B. and C., below.

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### **F. Unavailable and/or Irrelevant Evidence**

I attempted to review video footage from August 21, 2020, in the area near the entrance of the library and the adjacent hallway. However, the video footage had been deleted as of September 21, 2020, which was consistent with the stated practice of the school.

I also attempted to review Snapchat messages between the Complainant and Respondent between August 17, 2020, and October 1, 2020, but the Snapchat messages automatically deleted shortly after the time they were sent, and the parties did not otherwise save, copy, download, or otherwise document those messages.

I called the Speech and Language Therapist who conducted speech sessions with several students, including Complainant and Respondent. The speech therapist did not have any relevant or directly related recollections about any interactions between Complainant and Respondent.

### **G. Relevant Board Policies and Administrative Regulations**

For this investigation, I followed Administrative Regulation 5145.71, Title IX Sexual Harassment Complaint Procedures. I also reviewed the Notice of Allegations for the parties, which listed potential policy violations based on Complainant's allegations.

Complainant alleged sexual harassment by Respondent in the form of unwelcome physical and verbal conduct on the basis of sex as defined in AR 5145.71. The definition of sexual harassment applicable to this matter is:

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a student equal access to the district's education program or activity

Complainant also alleged sexual harassment when Respondent allegedly touched Complainant's private body parts, which may constitute a type of sexual assault under AR 5145.71.<sup>4</sup> The definition of sexual assault includes fondling, which is defined as:

The touching of private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

### **H. Evidentiary Standard**

For this investigation, the evidence was reviewed, compared, and analyzed under a preponderance of the evidence standard to determine whether the allegations were with or without merit. "Preponderance of the evidence," for purposes of this Report, means that the evidence on one side outweighs, or is more than, the evidence on the other side. This is a qualitative, not quantitative, standard.

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<sup>4</sup> Sexual fondling is a form of sexual assault as defined under 20 USC 1092 or 34 USC 12291.

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After listening, Complainant's parents asked if Complainant reported the incident to the teacher or Principal. Complainant said it did not "make sense" what happened or "what went wrong." Complainant felt embarrassed about all of it. When Complainant's parents expressed their sadness that Complainant did not tell them right away, Complainant explained, "I didn't want to talk about it." However, Complainant decided to tell them after seeing Respondent act "flirty" with Riley. The parents did not press Complainant for additional details, but Complainant agreed they could report the matter to the school. The Complainant and parents described meeting with the Title IX Coordinator, where Complainant discussed what happened with Respondent in the library and answered the Coordinator's general questions.<sup>6</sup>

***Investigator Review of the Allegations with Complainant.*** I acknowledged reviewing the formal complaint and explained to the family that I would ask Complainant some clarifying questions.

I asked how long Complainant had known Respondent. Complainant met Respondent for the first time in a speech session during the first week of school. I asked why Complainant thought Respondent was flirting. Complainant said Respondent smiled at Complainant, looked for Complainant in speech class, asked to message with Snapchat, and "complimented" Complainant by saying, "You slay." When asked if there were other Snapchat messages between them, Complainant said, "No." They typically communicated before or after speech sessions.

I asked Complainant what Complainant and Respondent did during the August 20, 2020 tutoring session. Complainant said they went over Chapter 1 of the algebra book, which was part of the review sheet. After the brief session, they agreed to go over the content in Chapter 2 the next day, on August 21, 2020. However, they did not go over much math at all on August 21, 2020. According to Complainant, Respondent seemed to want to do "other things."

When asked why Complainant thought Respondent wanted to do "other things," Complainant said Respondent talked about how algebra was "not easy" and said something that made Complainant laugh. Complainant stopped laughing when Respondent placed a hand on Complainant's knee which was closest to Respondent. Complainant did not understand what Respondent was saying or doing at that time because it happened "so fast" as Complainant laughed. However, Complainant clearly recalled Respondent "kinda squeezed" Complainant's groin area.

When asked if Respondent did anything else, Complainant said, "No, but Respondent said 'smash' more than once." I asked Complainant what "smash" meant, but Complainant did not know "exactly" except that Respondent's tone of voice was lower and different than a "tutoring voice." Complainant learned from friends later that "smash" usually meant sex. That meaning made sense to Complainant because Complainant recalled wanting to get away from Respondent. The next thing Complainant recalled was

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<sup>6</sup> The Title IX Coordinator's intake notes are in Section III.C., and Complainant's formal complaint is in Section II.A.

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- F. I whispered in Complainant's ear because the librarian was walking around, but I don't remember what I said. It was probably about math.
- G. Complainant did not move Complainant's chair away from me during our tutoring session.
- H. Complainant did not leave in a rush, and I don't remember seeing whether Complainant left the review sheet in the library.
- I. Complainant is making this up.

### **Exhibit 4.**

#### **2. Respondent's Interview**

I interviewed Respondent on October 9, 2020, and I asked Respondent to tell me about the August 21, 2020, tutoring session with Complainant in the library. Respondent said, "Nothing happened. We reviewed for the quiz. That's it." Respondent appeared reluctant to voluntarily provide more information, so I began asking questions based on Complainant's allegations. Respondent provided the following information during our interview:

- Respondent acknowledged tutoring other students at the circle table in the back of the library during the prior school year and noted how the Librarian approved of how Respondent conducted the tutoring sessions.
- Respondent admitted to asking Complainant on August 18 or 19, 2020, if Respondent could tutor Complainant in math. Respondent did not ask for any money as tutoring was like doing "community service."
- When asked about their Snapchat messages, Respondent said the messages were "no big deal." Respondent was being "nice" to a "freshman."
- During both times they were in the library, Respondent and Complainant met shortly after school was out, and they sat next to each other at Respondent's "normal" table in the back of the library.
- While tutoring the "second time," Respondent touched Complainant's bouncing knee quickly, like a "tap," to stop the distracting vibrations. Respondent denied keeping a hand on Complainant's knee.
- When asked about touching Complainant's lap, Respondent reiterated that "might have happened" after Respondent touched Complainant's knee.
- When asked if Respondent touched Complainant's lap before or after Respondent tapped Complainant's knee, Respondent did not remember.
- Respondent admittedly did not verbally ask Complainant to stop tapping the table. Instead, Respondent touched Complainant's bouncing knee to make

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Parents want to know whether Respondent will be removed from school. Parents say Complainant needs help. We discussed various supportive measures for Complainant. School will not put Complainant and Respondent in same classes for remainder of fall semester and spring semester and will revisit schedules moving forward. Complainant asked to attend speech sessions on a different day and time to avoid Respondent. Telephone call with Speech Department confirmed this option. Family also provided with referrals to counselors.

Complainant described what happened with Respondent. Said Respondent "pretended" to tutor Complainant but "used" Complainant instead. Complainant felt violated when Complainant touched knee, leg, and crotch area. When asked, Complainant clarified Respondent touched Complainant's genitals on outside of clothes, not just knee, while saying "smash," which Complainant believes means something about sex. At least it appeared that way to Complainant because Respondent was close to Complainant and touched Complainant's "private parts." Complainant exhibited anger and signs of being upset during interview. Complainant described feeling "stupid" for trusting an older student. Didn't want to talk to anyone about it; wanted to pretend it didn't happen. But, Complainant failed math quiz because left early, didn't study after "what happened" and couldn't find the study sheet. Too embarrassed to go back to library. Too embarrassed to go back to school. Felt bad, but faked being sick; and parents did not know what was wrong.

When asked if Librarian saw what happened, Complainant raised voice and said something like, "No! If Librarian saw it, wouldn't he have done something to help?" (Complainant appears to try to hold back emotions; looks away.) Complainant shared that when later saw Respondent stand close to Riley, Complainant knew for sure Respondent was "shady" and not to be trusted, even though Riley did not believe Respondent was fake when they talked about Respondent.

Explained the Title IX process to the family and their choice to file a formal complaint. Provided supportive measures regardless, but Respondent considered to be innocent unless evidence demonstrates responsibility. With the formal complaint, they can consider a mutual restriction on any communication between Complainant and Respondent.

Can only determine responsibility after full and fair investigation completed by a trained administrator. Explained complaint and investigation process, provided copies of AR 5145.71, and recommended taking some time to think about what next steps they may want. Provided TIXC contact information, which they could use to leave a message 24/7.

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I asked if the Librarian knew Complainant, and he did not. He knew Respondent because Respondent tutored other students in the library last year after school. The Librarian stated the Respondent typically tutored at one of the tables in the back of the library. Librarian stated that Respondent was welcome to tutor there because Respondent used a “nice indoor voice.”

During our interview, I observed that the Librarian’s desk faced out over the entire library. However, his view of the back tables was mostly blocked while sitting directly in front of his computer screen. When asked about hearing noise from the back of the library, the Librarian said he could not usually hear students talking that far away if they were using low voices.

I showed the Librarian a photo of Complainant from the student’s cumulative file, but he did not recognize Complainant. I explained that Respondent tutored Complainant in the library on August 20 and August 21, 2020, after school. The Librarian recalled seeing Respondent in the library around that time because he thought it was odd for Respondent to be tutoring that early in the school year. He also remembered cleaning up some papers after Respondent left, which was not something he had to do the year before. The Librarian did not keep those papers.

The Librarian stated he was not paying much attention when the two students were in the library because he was making sure his textbook and laptop distribution records were organized. When asked how long they were in the library, he said it was no more than 20-25 minutes at a time. When asked if they left together after tutoring, he stated Complainant left before Respondent.

I asked the Librarian if he saw Respondent touch Complainant’s knee under the table, and he did not. I asked the Librarian if he saw Respondent touch Complainant in any way under the table, and he did not. He stated he doubted Respondent “would do that.”

I asked the Librarian if he heard Complainant and Respondent use the word “smash” or “smashing.” The Librarian chuckled, but stated that he did not hear anyone say those words. He reiterated that he could not hear people that far away unless they were talking loudly.

#### **4. Riley**

Riley knows Complainant from middle school, and they had Algebra I together that school year. When asked how Complainant was doing in the math class, Riley said Complainant “hated” algebra from the beginning, but Complainant eventually “pulled it together” and recently did “pretty well” on a big test in September 2020.

I asked if Riley knew Respondent. Riley had seen Respondent at school and recently talked to Respondent, but Riley did not really know Respondent. I asked if Riley ever saw Complainant and Respondent together. Riley said no, but Riley recalled talking to Complainant after school a few months ago, and Complainant acted “weird” when Respondent walked by. When asked what that looked like, Riley said Complainant

**D. Documents or Other Evidence**

**1. Math Review Sheet**

I reviewed a copy of the Algebra I Review Sheet, dated August 10, 2020, and noted it was a study guide for the first quiz on August 24, 2020. The Review Sheet was set up to review Chapters 1 and 2 of the text book. **Exhibit 7.**

**2. Attendance Reports**

The Attendance Reports for Complainant indicated four days of absence due to illness from August 25 through August 28, 2020. **Exhibit 8.**

**3. School Calendar and Bell Schedule**

The District calendar indicated that Complainant and Respondent started the 2020-21 school year on Wednesday, August 5, 2020. The Bell Schedule indicated that school started at 8:30 a.m. and ended at 2:30 p.m. **Exhibit 9.**

**IV. SUMMARY OF DISPUTED AND UNDISPUTED RELEVANT EVIDENCE<sup>9</sup>**

The main issue in dispute is what occurred between Respondent and Complainant in the library after school on Friday, August 21, 2020. However, their interactions before August 21, 2020, may provide some relevant evidence for the Decision-Maker about the nature of the relationship between the Complainant and Respondent. Below, I have summarized some of the material issues and expressed whether those issues are disputed, undisputed, or disputed in part.

**A. Interactions between Complainant and Respondent between August 5-19, 2020**

**1. Undisputed Relevant Evidence**

- The 2020-21 school year began on August 5, 2020. Complainant and Respondent did not meet each other until their first pull-out speech session on Friday, August 7, 2020.
- Complainant and Respondent had classes near each other and would walk the same route to and from the speech classroom.
- Respondent, a 10<sup>th</sup> grader, was friendly with Complainant, a 9<sup>th</sup> grader, by smiling at Complainant, walking with or near Complainant to the speech classroom, and sometimes waiting for Complainant to walk back towards their classrooms.

<sup>9</sup> Section IV and V of this Report are provided to help the Decision-Maker synthesize the evidence. These sections are not required by the Title IX regulations.

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- Other than the Librarian, no one else was in the library during the tutoring session. The Librarian was mostly working on the computer during that time.
- A visual inspection of the library revealed that there was enough room for a person to touch another person's leg or lap if sitting next to them at a round table.
- Respondent touched Complainant's right knee under the table with Respondent's left hand, said something to Complainant, and also whispered something to Complainant.
- Complainant left the library before Respondent.
- The word "smash" is a common slang term that refers to sexual activity.

### **2. Disputed Relevant Evidence**

A review of the evidence indicates that the parties provided different accounts about (a) what Respondent said to Complainant immediately before and while touching Complainant under the table; (b) if the touching of the knee was sexual in nature; (c) whether Respondent intentionally or accidentally touched Complainant's thigh, inner thigh, and/or groin area; and if it was intentional, was the touching of the groin area for sexual gratification; and (d) whether the touching was welcome or unwelcome to Complainant.

- (a) What did Respondent say to Complainant before and while touching Complainant?
  - *Relevant Evidence from Complainant:*
    - Respondent told Complainant they "should smash" while placing a hand on Complainant's knee.
    - Complainant did not tell parents that Respondent used the word smash.
    - Complainant described Respondent using the word smash in the intake meeting with the Title IX Coordinator.
    - Complainant reported that Respondent said they should "smash" in the formal complaint.
    - Complainant recalled Respondent used the word smash more than once during our interview.



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moved up Complainant's leg and grabbed Complainant's groin area while saying, "You know, smash." Respondent also said, "You'll like it, I promise."

- During our interview, Complainant did not understand what Respondent was saying when Respondent placed a hand on Complainant's knee, but Respondent said "smash" more than one time. Complainant clearly remembered that Respondent "kinda squeezed" Complainant's groin area around the same time as using the word smash.
- Complainant pointed out that Respondent "flirted" before tutoring Complainant, Respondent asked for Complainant's Snapchat handle before offering to provide math tutoring, and Respondent told Complainant, "You slay," which was perceived as a compliment about how Complainant looked.

○ *Relevant Evidence from Respondent:*

- Respondent consistently explained the reason for touching Complainant's knee was to stop the knee from bouncing.
- Respondent did not verbally tell Complainant to stop tapping a knee before touching Complainant's knee.
- When asked if Respondent used the words "smash" with Complainant, Respondent said, "I don't recall that...I wouldn't say that because that's like about sex."
- When asked, Respondent denied being sexually interested in Complainant.

- (c) Did Respondent touch Complainant's thigh, inner thigh, and/or groin area on accident or on purpose? If the touching of the groin was on purpose, was the touching for sexual gratification?

○ *Relevant Evidence from Complainant:*

- Complainant described Respondent's hand touching Complainant's "private area" when telling Complainant's parents what happened in the library.
- Complainant described in the formal complaint that Respondent quickly moved a hand up Complainant's

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- The Librarian, the math teacher, and Respondent's mother all noted that it was unusual for students to use tutors so early in the school year.
  - Respondent offered to tutor Complainant.
- (d) Was Respondent's touching of Complainant welcome or unwelcome?
- *Relevant Evidence from Complainant:*
    - There is some evidence that Complainant "liked" Respondent and thought Respondent was "kinda hot" before August 21, 2020. However, after August 21, 2020, there is evidence that Complainant described Respondent as "fake" and "shady."
    - Complainant did not seek out additional tutoring from Respondent after Complainant failed the algebra quiz on August 24, 2020.
    - While explaining to Complainant's parents what happened on August 21, 2020, Complainant described leaving the library "quickly."
    - During the Title IX intake meeting, Complainant described leaving early, not studying after "what happened" and not able to find the study sheet, but being too embarrassed to go back to library.
    - In the formal complaint, Complainant described standing up, faltering while moving the chair, and leaving quickly without taking the review sheet.
    - During our interview, Complainant described getting up in a "clumsy" way and leaving the library without the math sheet.
    - Complainant missed four days of school shortly after the alleged incidents with Respondent and after failing the math quiz.
  - *Relevant Evidence from Respondent:*
    - Respondent did not provide any evidence that Complainant wanted to be touched by Respondent.

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When Respondent provided substantive answers to the investigator's questions, Respondent displayed minimal inconsistencies, but I noted Respondent also provided minimal details in response to Complainant's serious allegations. Respondent consistently stated or implied that Complainant was motivated to lie to justify why Complainant was failing algebra or because Complainant liked Respondent. However, I noted that Respondent did not know if Complainant was failing algebra at the time Complainant filed the formal complaint because they no longer were in a tutoring relationship. Respondent's belief that Complainant "liked" Respondent was not supported by any examples after their interaction in the library on August 21, 2020.

### **VI. CONCLUSION OF INVESTIGATION**

On October 29, 2020, I provided this Final Investigative Report to the Complainant/parents and Respondent/parents for their review, inspection, and comment via the secure dropbox. While the parties received 10 calendar days to review and/or comment on the Report, neither party nor their parents submitted a written response to this Final Investigative Report.

This concludes the investigation phase of the Title IX Complaint Process. This Report and all Exhibits have been submitted to the Decision-Maker on November 9, 2020.